IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 12TH JUNE 2007 / 22ND JYAISHTA 1929

WP(C).No. 5481 of 2007(R)

PETITIONER:

N.AJITH, S/O. LATE N.A.MENON,
AGED 35 YEARS, ADVOCATE, NAMBIARUVEETTIL,
IRINJALAKKUDA P.O., THRISSUR.

BY ADV. SRI.K.JAJU BABU
SMT.M.U.VIJAYALAKSHMI
SRI.BRIJESH MOHAN
SRI.T.R.SADEESAN
SMT.DHANYA CHANDRAN

RESPONDENTS:
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1. **STATE OF KERALA, REP. BY THE CHIEF SECRETARY TO GOVT., GOVT. SECRETARIAT, THIRUVANANTHAPURAM.**

2. **THE ADDITIONAL CHIEF SECRETARY/ PRINCIPAL SECRETARY TO GOVERNMENT, HOME DEPARTMENT, GOVT. SECRETARIAT, THIRUVANANTHAPURAM.**

3. **THE HIGH COURT OF KERALA, KOCHI-683 031, REP. BY THE REGISTRAR (GENERAL).**

BY ADV. SRI.KRB.KAIMAL (SR.)
SRI.B.UNNIKRISHNA KAIMAL
GOVERNMENT PLEADER SRI.M.MANOJ KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/04/2007, ALONG WITH WPC NO. 9427 OF 2007 THE COURT ON 12/06/2007 DELIVERED THE FOLLOWING:

W.P.(C) NO.5481/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE DRAFT RULES VIDE G.O.(P) NO. /06 ISSUED BY THE 1ST RESPONDENT.

EXT.P2:- COPY OF THE NOTIFICATION VIDE NO.G.O.(P) NO.158/06/HOME DT.31.8.06.

EXT.P3:- COPY OF THE JUDGMENT DT.1.9.06 IN WP(C) NO.17287/06 OF THE HONOURABLE COURT.

EXT.P4:- COPY OF THE AFFIDAVIT FILED BY THE 1ST RESPONDENT (IA.NO.17733/06 IN WP(C) NO.17287/06.)

RESPONDENTS EXHIBITS

EXT.R3(a):- COPY OF THE LETTER NO.12814/C3/06/HOME DT.26.7.06 OF THE ADDL.CHIEF SECRETARY TO GOVERNMENT TO THE 3RD RESPONDENT.

/TRUE COPY/

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THOTTATHIL B. RADHAKRISHNAN, J.

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WP(C).Nos.5481/2007-R & 9427/2007-R

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Dated this the ---- day of April, 2007.

O R D E R

Issues:

Having regard to the pleadings and arguments raised, the following issues emerge for consideration:

(i) Are these writ petitions maintainable?

(ii) Are the Amending Rules, to the extent impugned, made after consultation with the High Court as enjoined by Article 234 of the Constitution?

(iii) If not, is the impugned amendment to Rule 10(1) of the Special Rules void and inoperative?

(iv) In the absence of any provision in Rule 10(2) of the Special Rules as amended by the Amending Rules prescribing any particular period of the applicant having functioned in one or more of the categories enumerated in Rule 5(3) of the Special Rules, is the prescription in the High Court notification for the Kerala Judicial Service Examination 2007

that no officer in service shall be eligible for appointment by transfer unless he has functioned at least for a period of two years in anyone or more of the categories mentioned in Rule 5 (3) of the Special Rules unauthorised or bad in law?

(v) If so, is the application of the petitioner in WP(C). No.9427/2007 to be considered without insisting on certificate in Form C as required by that notification?

Elsewhere

Though in terms of the decision of the Apex Court in Sushma Suri v. Govt. of National Capital Territory of Delhi [(1999) 1 SCC 330], Government counsel, who may be a Public Prosecutor or a Government Advocate, may be entitled to be considered for appointment by treating his term as a Government Pleader or a Public Prosecutor also to be counted for his experience at the bar, such a view would not

necessarily aid the petitioner because admittedly he is over-aged for being considered for appointment by direct recruitment. Therefore, the short question that arises is as to whether he is entitled to be considered for appointment by transfer without completing a period of two years of probation as an Assistant Public Prosecutor Grade II.

Issue No.I:

In All India Judges' Assn. Case - 1993, the Apex Court directed by its concluding paragraph as follows:

In view of the said clear direction, the question of implementation or clarification of the directions contained in the decisions in the All India Judges' Assn. Case could be

sought for only from the Apex Court and not from the High Court. This situation is beyond any doubt, at any rate, after the decision in State of Bihar v. Ramjee Ram [(1998) 8 SCC 499].

In the aforesaid premise, the issue of maintainability of these writ petitions was raised during the hearing. It is pointed out by the learned counsel for the petitioners as also the learned Government Pleader that no clarification or directions for implementation of the directives in the different judgments in All India Judges' Assn. cases are being sought for and that the issue raised is only as regards the validity of the rules and other related questions. The arguments advanced on the merits of these writ petitions are also such that they do not really call for any clarification or directions regarding compliance of the directives issued by the Apex Court as per the different judgments and orders in the All India Judges' Assn. case. Under such circumstances, these writ petitions are held to be maintainable.

The Amending Rules to the extent challenged relate only to amendment of Rule 10(1) of the Special Rules whereby the

prescription recommended by the High Court, namely, that a candidate for appointment by direct recruitment must be practising as an advocate on the last date fixed for receipt of application, has not been accepted by the Government.

The question in this context is as to whether consultation with the High Court in terms of Article 234 of the Constitution has been complied with. In A.C.Thalwal v. High Court of H.P. [(2000) 7 SCC 1], the Apex Court laid down that the provision in Article 234 of the Constitution for consultation with the High Court is mandatory and that consultation contemplated by Article 234 is not a matter of mere formality; it has to be meaningful and effective. It was categorically laid down that the status which the High Court as an institution enjoys in the constitutional scheme and the expertise and the experience which it possesses, of judicial services, command with justification, a place of primacy being assigned to the High Court in the process of consultation. Fundamental reason for this view, as stated in that judgment, is that judicial services have to be independent of executive influence and so the Constitution has placed them on a pedestal different from

other services under the State and the constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy. Following the observations of the Constitutional Bench in Supreme Court Advocates on Record Association v. Union of India [(1993) 4 SCC 441], it was observed that the High Court assumes primacy because of its being best equipped to discharge the greater burden in the process of consultation contemplated by the Constitution and it is not a question of determining who between the two constitutional functionaries is entitled to greater importance or to take the winner's prize at the end of the debate.

The directions of the Apex Court in All India Judges' Assn. case - 2002 were issued on 21-3-2002. The rule-making power under Article 234 is on the Governor. As a necessary corollary, the Governor is obliged in terms of Article 234 to make rules. Such rule-making has to be after consultation with the High Court. The Governor is to act on the aid and advice of the Council of Ministers except in so far as he is by or under the Constitution required to exercise his functions, or any of them in his discretion. In the light of Article 163, the

Government are therefore obliged to ensure that the constitutional duty of the Governor in terms of Article 234 is promptly and expeditiously discharged, having regard to the constitutional requirement to ensure that matters in relation to recruitment to judicial service are promptly made. It is a matter of record that in spite of the directions of the Apex Court on 21-3-2002, as already noticed, no action emanated from the Government to forward the draft rules. It was, obviously, under those circumstances that the High Court made draft of the rules and forwarded it. It is the clear and specific stand of the High Court in its recommendations as part of the consultative procedure that one has to be practising as an advocate in the civil/criminal courts as on the last date fixed for receipt of application, for being considered for appointment as Munsiffs/Magistrates by direct recruitment, in terms of the law laid by the Apex Court as noticed above. This view of the High Court is of primary importance and had to be given pre-eminence, if a law is to be made in the form of a rule under Article 234 of the Constitution touching the recruitment into the judicial service of the State.

As already noticed, an Under Secretary to Government on behalf of the Principal Secretary to Government wrote the letter (Ext.R3(a) in WP(C).No.5481/2007), addressed to 27 Service Organisations and the Registrar of the High Court convening a meeting "to discuss the matter on the above item". "Above item" are matters which related to the fixation of qualification for recruitment. The said letter does not contain any expression of the views of the Government in that regard. In so far as the High Court is concerned, the view was that no alteration or modification was necessary particularly because the Government had not expressed any contrary view. It was, obviously, therefore that the Government were informed that the Registrar is not attending the meeting.

However, having regard to the constitutional set up and the primacy of the High Court in the consultative process which is mandatory in terms of Article 234 and because it is the High Court that has to be consulted with and not the Registrar, I am of the view that it was impermissible for the Government to convene a meeting of the nature in which it had wanted to do in terms of the aforesaid letter (Ext.R3(a) in WPC

(C).No.5481/2007). The High Court, going by Article 366(14), is a court constituted under the Constitution as a High Court or which may be declared by Parliament to be a High Court for the purpose of the Constitution. The Registrar of the High Court is not the consultee in terms of Article 234 of the Constitution. Even if the Government had a different view in the matter, it was the constitutional obligation to intimate the High Court such views through its Registrar which then would gain attention of the Chief Justice or the Full Court of the High Court as may be required by the rules of business of the High Court. Even if the Registrar were to attend the meeting as convened as stated above, it was not within the powers of the Registrar to take any view or make any statement regarding any policy decision touching the judicial service, which is entirely a matter on which the consultative opinion can come only from the High Court thereby meaning the Full Court or the Chief Justice as the case may be in terms of the rules of business of the High Court on the administrative side.

Fore the aforesaid reasons, no due action was taken in terms of article 234 of the Constitution in relation to the

making of the Amending Rules to the extent impugned and the Government have usurped the powers of the High Court in the making and publication of the Amending Rules to the extent impugned. It is held so.

THOTTATHIL B. RADHAKRISHNAN, J.

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WP(C).Nos.5481/2007-R & 9427/2007-R

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Dated this the 13th day of April, 2007.

O R D E R

Admitted. Heard the learned senior counsel Smt.V.P.Seemanthini assisted by Adv.Smt.S.Karthika on behalf of the petitioner, the learned Government Pleader on behalf of the State of Kerala and the learned senior counsel Sri.O.V.Radhakrishnan assisted by Adv.Sri.Antony Mukkath on behalf of the second respondent in W.P.(C).No.9427/2007 and

Adv.Sri.K.Jaju Babu, the learned counsel for the petitioner and the learned senior counsel Sri.K.R.B.Kaimal assisted by Adv.Sri.B.Unnikrishna Kaimal on behalf of the 3rd respondent in WP(C).No.5481/2007. The counter affidavit filed by the State and the counter affidavit of the third respondent in WP (C).No.5481/2007 are on record. The matters finally heard. Judgment reserved.

There will be an interim order that the receipt of applications on the basis of Notification No.B1-87546/2006/B4 dated 15-2-2007 issued by the High Court of Kerala will be provisional and subject to the result of these writ petitions. There will be a further interim order that the application of the petitioner in WP(C).No.9427/2007 will also be provisionally received, without insisting on Form C, subject to the result of these writ petitions.

Hand over.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/-